

**OPINION
61-102**

January 26, 1961 (OPINION)

GOVERNOR

RE: Absence From State - Signing Legislative Bill

This is in reply to your letter in which your ask for an opinion on the following:

In the event the signing of a bill took place in another state and the bill was a controversial matter, could the legality of the signing be questioned? In what position would it place the constitutionality of the bill involved? Are there any instances of such on record?"

A reasonable research does not disclose that the North Dakota Supreme Court has had occasion to rule on this question or similar questions. The answer to these questions apparently revolves around the construction of Section 72 of the North Dakota Constitution which provides as follows:

A lieutenant governor shall be elected at the same time and for the same term as the governor. In case of the death, impeachment, resignation, failure to qualify, absence from the state, removal from office, or the disability of the governor, the powers and duties of the office for the residue of the term, or until he shall be acquitted or the disability be removed, shall devolve upon the lieutenant governor."
(Underscoring ours)

The North Dakota Supreme Court had under consideration this section in the case of State ex rel. Olson v. Langer, 65 N.D. 68, and on page 83 said:

. . . . We must presume, of course, that the words used by the framers of the constitution were used in their ordinarily accepted sense unless the contrary clearly appears. Indeed, unless given the ordinary and accepted meaning, disability would have no place in this constitutional provision. Applying that meaning to the term it must be said that the framers of the constitution contemplated that any cause, whether mental, physical, or legal, which operated to disqualify the governor would devolve the duties of the governor upon the lieutenant governor."

In this case the court was speaking of a disability as a result of the governor having been convicted of a felony. The court was construing the term "disability." However, in our question we are concerned with the phrase "absence from the state."

The court in State ex rel. Sathre v. Moodie, 65 N.D. 340, again had Section 72 of the Constitution under consideration, and recited with the approval what was said in the case cited above.

In State ex rel. Weeks v. Olson, 65 N.D. 407, the court again had Section 72 under consideration. In this case the court said:

. . . . Neither the Constitution nor statutes limits the powers or duties which devolve upon the acting governor, in the case of the death, impeachment, resignation, failure to qualify, absence from the state, removal from office, or the disability of governor. . . ." (Underscoring ours)

From the clear wording of Section 72 it appears that where the governor is absent from the state, the duties devolve upon the lieutenant governor until the governor has returned to the state. By devolving the powers and duties upon the lieutenant governor, it necessarily follows that where the governor is absent from the state he no longer can act as governor. He is governor in the sense that he holds the title, but while absent from the state his duties as governor devolve upon the lieutenant governor.

The Supreme Court of Arkansas in the case of Walls v. Hall, 154 S.W.2d. 573, had under consideration a question more closely related to the question that you submitted. In this respect it must be noted that the Constitution of Arkansas is in substance identical to the North Dakota constitutional provision. Section 4 of the Arkansas Constitution provides as follows:

In case of the impeachment of the Governor, or his removal from office, death, inability to discharge the powers and duties of the said office, resignation or absence from the State, the powers and duties of the office, shall devolve upon the Lieutenant Governor for the residue of the term, or until the disability shall cease. . . ."

The Arkansas Constitution also provided by Section 5 that:

The lieutenant Governor shall possess the same qualifications of eligibility for the office as the Governor. He shall be President of the Senate, but shall have only a casting vote therein in case of a tie vote. If during a vacancy of the office of Governor, the Lieutenant Governor shall be impeached, displaced, resign, die, or become incapable of performing the duties of his office be absent from the State, the President of the Senate shall act as Governor until the vacancy be filled or the disability shall cease; and if the President of the Senate for any of the above causes shall become incapable of performing the duties pertaining to the office of Governor, the Speaker of the Assembly shall act as Governor until the vacancy be filled or the disability shall cease."

In this case the governor was absent from the state and the lieutenant governor also was absent momentarily from the state. During such absence the president pro tem assumed the duties of governor without taking any further oath of office. He assumed actual possession and control of the office, and as acting governor he vetoed a bill passed by the Legislature. Such Act was challenged and the court upheld the president pro tem's right to act as governor which included the vetoing of a bill. The court in passing on the question said:

It is our view that 'absence from the state' as used in the amendment means out of the state for any period of time. We think one purpose of the amendment was to have someone in the state at all times capable of performing the duties and exercising the powers of the office of governor."

Also in passing on the question, the court, quoted from *Ex parte Crump*, 135 P 428, 47 LRA (NS) 1036.

I adhere to the views expressed in the main opinion; and that when the Governor is out of the state for any length of time I think a vacancy in the office then and there occurs, and it is immaterial as to what length of time he may have been out of the state, or what distance he had gone beyond the borders of the state. . . . He might be in an adjoining state at a ball game or on a visit to Europe, or he may be away for several hours or several months. In either event there is a vacancy in the office according to the language of the Constitution, Section 131, which provides:

'When the Governor shall be absent from the state, . . . the lieutenant governor shall discharge the duties of said office until the Governor may be able to resume his duties.'

The court continued to quote (from the above case) as follows:

He is not Governor when out of the state, so far as being able to act. It would be violating the language and spirit of this constitutional provision, and would also be venturesome on the part of this court, to hold or attempt to prescribe the length of time the Governor must be out of the state, or the distance he must be away from the state before a vacancy occurs, which empowers the lieutenant to act. It would not be safe to adopt any rule, except that, when the Governor is beyond the borders of the state, this fact automatically causes a vacancy in his office, and the lieutenant governor, who is made a substitute for the Governor in his absence, with the powers and duties of the Governor, shall exercise the functions of that office."

In the case before the Supreme Court cited above the lieutenant governor was absent only for a few hours, but the court still held that the president pro tem was entitled to act as governor, and as acting governor had a right to veto the bill.

From the foregoing it would appear that where the duties devolve upon the lieutenant governor, they are transferred to him. As such, they are lost to the governor momentarily. This, of course, applies only to such duties which must be performed as governor. These duties are at all times vested in some person, and one person at a time only.

It is therefore our opinion, based on the foregoing rules of law adopted and announced by the courts and upon the construction placed on Section 72 of the Constitution, that when the governor is absent from the state for any length of time or distance, a temporary vacancy in the office of governor exists, which is automatically filled by the lieutenant governor who can assume such duties without

first taking an oath as governor.

It is our further opinion that to avoid any doubt and to assure the constitutionality of an act that the lieutenant governor should perform the duties of governor where the governor's action is required, but he is absent from the state. This is not a matter of choice, but is by automatic operation of law, which means that the lieutenant governor could be compelled to act by mandamus proceedings.

LESLIE R. BURGUM

Attorney General